MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

—against—

GLORIA DAWN AMMAR, as the Administratrix of the estate of HOWARD ALI AMMAR, deceased,
Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL PETITION IN SUPPORT OF ITS PETITION FOR REHEARING

JAMES M. ESTABROOK
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Of Counsel

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Petitioner, American Export Lines, Inc., hereby moves for leave to file a supplemental petition in support of its petition for rehearing to bring to the attention of the Court additional reasons for granting the writ arising out of the death of original respondent, Howard Ali Ammar, on June 22, 1964, as to which respondent's counsel had knowledge on June 29, 1964, while the Petition for Certiorari was under consideration, but as to which petitioner was first notified on December 9, 1964.

Petitioner had previously filed its petition for certiorari from a decision of the Court of Appeals for the Second Circuit affirming a judgment on the verdict by the United States District Court for the Southern District of New York. The action was under the Jones Act. Respondent recovered $11,000 for the direct consequences of an accident November 9, 1959 on petitioner's vessel and the bal-

ance of $186,261.45 for the consequences of a motorcycle accident on July 20, 1961. The jury found respondent 59.64% negligent as to the motorcycle accident and reduced its award accordingly.

Respondent's death points up the speculative and inequitable elements of the decision below and provides additional reasons for granting the writ.

When respondent was permitted to recover at all for a motorcycle accident as to which he was found 59.64% contributorily negligent, such recovery was based upon medical testimony connecting the shipboard accident to the motorcycle accident. Yet the same medical witnesses also testified that respondent had a normal life expectancy.

When we consider that any rule of law other than the rule requiring injured persons to take due care will always depend upon speculative opinion testimony, the reasons for petitioner's position are all the more compelling.

An additional inequity appears in that respondent's damages for wrongful death are less than for injury resulting in total permanent incapacity. Death damages are based on future contribution by the decedent to his family, while injury damages are based on total earning capacity and future pain and suffering.

This motion is also made to [redacted] dent's counsel the right to reply.

WHEREFORE, petitioner requests leave to file the annexed Supplemental Petition for Rehearing to its Petition for Rehearing filed November 5, 1964.

Respectfully submitted,

JAMES M. ESTABROOK
Counsel for Petitioner

HOLLIS M. WALKER, JR.
Of Counsel

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SUPPLEMENTAL PETITION IN SUPPORT OF PETITION FOR REHEARING

STATEMENT

Petitioner, American Export Lines, Inc., submits its supplemental petition in support of its Petition for Rehearing, filed November 5, 1964, to bring to the attention of the Court issues raised by the death of respondent on June 22, 1964, as to which respondent's counsel was retained on June 29, 1964, but as to which petitioner's counsel was first notified on December 9, 1964. On December 9th petitioner's counsel consented to the substitution of Mrs. Ammar, the administratrix, as party respondent; obviously she, as administratrix, is the only and the necessary party respondent. Petitioner does not question her right to be a party.

Had respondent's counsel notified petitioner's counsel in time, the points covered herein could have well been included in the petition for rehearing.

This supplemental petition is being submitted to call the Court's attention to matters arising after the timely submission of the petition for rehearing in accordance with the procedure followed in *Carpenter* v. *Wabash Ry. Co.* 309 U. S. 23 (1940).

Additional Reasons for Granting the Petition for Rehearing and Issuing the Writ.

Respondent had recovered a judgment on a verdict under the Jones Act not only for personal injuries resulting directly from an accident on respondent's vessel on November 29, 1959 at Madeira, but also for injuries following a motorcycle accident July 20, 1961 at Mastic Beach, New York as to which the jury found respondent 59.6% contributorily negligent.

According to respondent's motion for substitution and annexed papers, original respondent died June 22, 1964 of sepsis pyelonephritis (blood poisoning induced by malfunctioning kidneys), quadriplegia and fracture-dislocation of cervical spine.

As appears from the Petition for Certiorari and the Petition for Rehearing, the quadriplegia and the fracture-dislocation of the cervical spine were caused, not by the accident on petitioner's vessel, but by a motorcycle accident on July 20, 1961 when respondent attempted to ride a strange motorcycle at night.

Error was committed when the Courts below concurred that a proper Jones Act jury charge should include neither the universally recognized law that an injured plaintiff has a duty to exercise reasonable care to avoid further injury failing which he must bear the loss nor the doctrine of avoidable consequences, i.e., that an injured party who subsequently sustains further injuries by reason

of his own failing to exercise due care, is precluded from recovery of the consequential damages. The Court of Appeals stated further that foreseeability of harm, indeed, even causation analysis need not be considered by the jury in a Jones Act case.

The case was thus permitted to go to the jury on the theory that respondent's damages, reduced only by comparative negligence, should be based on respondent's prospective loss of earnings and future pain and suffering; respondent's doctors testifying he had a normal life expectancy (Petitioner's App. 85a-86a; Respondent's App. 70).

Now time has proven the fallacy of respondent's arguments and testimony; rather an exhorbitant verdict has been sustained based on conjecture and rationalization; such a result is an invitation to fraud.

This Court has always been ready to review facts elicited after judgment was rendered, as was done in *United States* v. *Pink*, 315 U. S. 203 (1941), where at pages 220 and 221 the Court held that a declaration as to Russian Law (a question of fact, not law) made after judgment had been rendered by the trial Court should have been considered by the New York Court of Appeals.

A similar situation arose when the petitioner in *Gallick* v. *Baltimore and Ohio R. R. Co.*, 372 U. S. 108 (1963) died after this Court had reversed an Ohio Court of Appeals decision setting aside a jury verdict in favor of petitioner. The Gallick case was eventually settled for about two thirds of the jury verdict.

This doctrine of recognizing factors arising after judgment when necessary to accomplish substantial justice has more recently been recognized in *United States* v. *Alabama*, 362 U. S. 602 (1960). Any different rationale will certainly make almost impossible the protection of minority rights in those jurisdictions where enforcement of national policies

depends upon close appellate supervision over uncooperative trial Courts.

CONCLUSION

For the reasons set forth above, in the Petition for Rehearing and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

JAMES M. ESTABROOK
Counsel for Petitioner

HOLLIS M. WALKER, JR.
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Supplemental Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JAMES M. ESTABROOK
Counsel for Petitioner